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No. 73-1600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, Trustees of the Property of the PENN CENTRAL TRANSPORTATION COMPANY,

Petitioners,

v.

FIDEL GÖTZ, VOLKER GÖTZ, FINANZ AKTIENGESELLSCHAFT, VILEDA ANSTALT, GÖTZ AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as GÖTZ AG OF ST. GALLEN, or GÖTZ ANSTALT OF ST. GALLEN, or GÖTZ ESTABLISHMENT OF ST. GALLEN, or GÖTZ ESTABLISHMENT OF ST. GALLEN), INTER-INDUSTRY AKTIENGESELLSCHAFT OF ST. GALLEN (Also Known as INTER-INDUSTRY AG OF ST. GALLEN, or INTER-INDUSTRY ANSTALT OF ST. GALLEN, or INTER-INDUSTRY ESTABLISHMENT OF ST. GALLEN, or INTER-INDUSTRY ESTABLISHMENT OF ST. GALLEN), INTER-MARKETING CORP. ANSTALT (Also Known as INTER-MARKETING CORP. ESTABLISHMENT, or INTER-MARKETING CORP. ESTABLISHMENT), MINOLTA ANSTALT, and FINANZ AG ST. GALLEN,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

SAUL L. SHERMAN
750 Third Avenue
New York, New York 10017
ARTHUR G. CONNOLLY
ARTHUR G. CONNOLLY, JR.
Farmers Bank Building
Wilmington, Delaware 19899
Attorneys for Respondents.

BOBBY RIVKIN SHERMAN
LEVY and REHM,
CONNOLLY, BOYE & LODGE.

May 20, 1974.

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BRIEF OF RESPONDENTS IN OPPOSITION

This case arises out of a civil action for a money judgment brought against nine non-resident defendants in the United States District Court for the District of Delaware. Alleging that the defendants could not be personally served in Delaware, plaintiffs invoked the Delaware sequestration statute (see F.R.C.P. Rule 4(e)) and obtained an ex parte order sequestering certain securities allegedly belonging to the defendants.

The District Court later granted defendants' motion to vacate the sequestration—on the ground that plaintiffs had

not satisfied the procedural requirements of Delaware law (73a *et seq.*). An evenly divided Court of Appeals for the Third Circuit affirmed (6a-9a).

QUESTIONS PRESENTED

Because the Petition ignores the state law issues presented, we offer our counterstatement of the issues:

1. Whether the District Court was correct in vacating the sequestration order because, as a matter of Delaware law, the plaintiffs had failed sufficiently to specify the property to be seized and the nature or even the existence of the defendants' interests therein.

2. If not, whether the sequestration order would have to be vacated on one or more of the following additional state law grounds not passed upon by the courts below:

   (a) the notes, debentures and warrants purportedly seized are negotiable and therefore have no situs in Delaware and cannot be seized in Delaware under applicable state law;

   (b) of the three defendants whose property was purportedly seized, one had effectively transferred its property to a third party prior to the sequestration, and the Delaware procedural requirements had not been met as to the other two defendants because no bona fide substantive claim is asserted against them in the complaint; and

   (c) the Delaware sequestration statute is inapplicable because there is an adequate remedy at law, and under Delaware law sequestration is only available in equity.

3. If all of the foregoing state grounds are decided adversely to the defendants, whether the application of the

Delaware sequestration statute in the circumstances of this case would violate the Due Process and Search and Seizure provisions of the Constitution.

STATEMENT OF THE CASE

Plaintiffs allege that some of the defendants improperly received a payment from a fund deposited by one of plaintiffs' subsidiaries in Europe. Although it is now admitted that "there are no minimum contacts between [Delaware] and either the subject matter or the defendants" (Petn., p. 3), plaintiffs nevertheless sought to establish jurisdiction in the Delaware District Court by sequestering securities held outside of Delaware by the defendants. It is undisputed that these securities had nothing to do with the claim asserted, and that they were physically located outside Delaware and have never been physically seized in this proceeding—but they had been issued by companies which happened to be incorporated in Delaware. Such was the Delaware nexus on which plaintiffs sought to predicate jurisdiction.

Defendants argued to the District Court all of the issues of state law set forth above, and the District Court decided the case on the threshold ground of the insufficiency of the motion papers. The defect in the moving affidavit, the District Court held, was no mere matter of form, but rather reflected an attempt to use the process of the court for an improper purpose which the applicable Delaware Chancery Court rule was designed to prevent (82a). In particular, the moving affidavit did not demonstrate that plaintiffs had sufficient knowledge as to what if any property of the defendants was subject to seizure in Delaware, and plaintiffs had instead improperly used the court to locate property for them to seize (82a).

Neither party has put in a word of proper evidence as to the merits. The amended complaint is unverified, and such affidavits as plaintiffs have filed are admittedly double hearsay at best.* Defendants have necessarily remained silent as to the merits, for to do otherwise would have been to appear generally and submit to in personam jurisdiction in a totally inappropriate forum having no meaningful contact with the case.

DECISIONS BELOW

The District Court concluded that the sequestration should be vacated on purely state law grounds, saying:

> "The motion to vacate the sequestration will be granted because of the insufficiency of the Taylor affidavit. The defendants have raised other substantial objections to the validity of the seizure but it is unnecessary to pass upon any of these." (84a)

The District Court expressed as follows its reasons for finding the Taylor affidavit insufficient to meet the local requirements of Delaware law:

> "If Taylor's affidavit is sufficient to support the present seizure, so also would be an affidavit stating that one or more of fifty defendants *might* own specified stock or bonds in one or more of one hundred companies. On the basis of such an affidavit the sequestrator would be required to perform the duties of a 'fisherman', to use the *Cantor* v. *Sachs* expression, and thereby ascertain which if any of the defendants owned

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* As below, plaintiffs have tried to sway the Court by submitting a Congressional Committee Staff Report which has not been offered in evidence and is the rankest hearsay.

which if any of the property designated. In the *Cantor* case Chancellor Wolcott said:

> 'It seems to me that complainants who seek to bring their adversaries into court by seizure of their property ought to be prepared to say with reasonable certainty what property they desire to have seized.' *Cantor* v. *Sachs,* 162 A. 73, 85 (Del. Ch. 1932).
>
> "The purpose of Rule 4(db) is to thwart fishing expeditions. *Rebstock* v. *Lutz,* 158 A.2d 487 (Sup. Ct. Del. 1960), *Lutz* v. *Boas,* 156 A.2d 96 (Del. Ch. 1959). This object would be defeated if the Taylor affidavit were held to be sufficient to support the sequestration." (82a)

On appeal to the Third Circuit, a three-judge panel split 2-to-1, the majority voting to reverse and remand (11a). The full bench, however, granted defendants' petition for rehearing in banc. In doing so, the Court of Appeals in banc vacated the judgment of the three-judge panel (9a), thus expunging their opinions and depriving them of effect. After reargument before the full bench, the eight circuit judges sitting divided evenly, with the result that the District Court's decision was affirmed per curiam with no opinion expressed on any of the issues, state or federal (7a, 5a).

SUMMARY OF ARGUMENT

No constitutional questions were decided below, and this Court would have to decide numerous questions of state law (only one of them passed upon below) before any of the issues discussed in the Petition would be reached. These state law issues would be of little or no interest to this Court under the standards enunciated in Rule 19.

And yet the Court, under its deep-seated self-imposed doctrine of avoiding constitutional issues where possible, would be constrained to adopt any reasonable disposition of the state law issues which would make it unnecessary to confront the lurking constitutional questions. The state law grounds asserted are eminently reasonable, and there is not a word to the contrary in the Petition.

Denial of certiorari, on the other hand, would leave no lower court precedent on constitutional issues. No constitutional issues were decided below. Denial of certiorari would deprive no one of any claimed constitutional rights. It was defendants who claimed constitutional protections but our rights were vindicated on state law grounds, making recourse to the constitution unnecessary.

The repeated assertions in the Petition that the Court of Appeals divided evenly on the constitutional issues is utterly unfounded speculation, arrived at by the simple expedient of ignoring the state law issues. If anything, it would be more realistic to assume that the Circuit Court divided on the state law issue the District Court found controlling. All that can properly be said is that the Circuit Court decided nothing and affirmed of necessity.

I. THERE ARE NUMEROUS STATE LAW ISSUES WHICH WOULD BE DISPOSITIVE HERE, AS THEY WERE BELOW.

A. *THE CASE WAS PROPERLY DECIDED BELOW ON THE INSUFFICIENCY OF THE AFFIDAVIT IN SUPPORT OF SEQUESTRATION.*

As the District Court held, the sequestration order and the affidavit on which it was based were fatally defective because they did not specify the property to be seized,

as required by Delaware Court of Chancery Rule 4(db) and the Delaware cases. The affidavit merely indicated that one or more of the 9 defendants might have an interest in one or another of thirteen categories of property issued (or held) by one or more of 16 Delaware companies —a total of 144 inquiries, each as to many types of property. Many of the 16 Delaware companies were stock brokerage firms obviously holding securities for clients in hundreds of companies.

Of the 16 Delaware companies to whom the Notice of Sequestration was directed, two reported securities of one defendant each and one reported securities of two defendants. Thus, out of 144 inquiries, each pertaining to many varieties of obligations, only four—one in every 36—bore fruit.

Of nine defendants, property in the name of only three was found. Of sixteen companies notified, only three reported property in the name of any of the defendants.

Cantor v. *Sachs*, 162 A. 73 (Del. Ch. 1932), is one of a long line of Delaware cases holding that "scandalous abuses could be perpetrated" if a sequestration is so indefinite as to amount to a fishing expedition. As the Chancellor noted in *Cantor:*

> ". . . some safeguards should be provided against what for want of a better term I may call fishing expeditions. It seems to me that complainants who seek to bring their adversaries into Court by seizure of their property ought to be prepared to say with reasonable certainty what property they desire to have seized. It is hardly comportable with the dignity of the Court to appoint a judicial agent to go forth on a hunt in behalf of a

complainant and beat the bushes for him." At 85.

This Court has recently had occasion to emphasize the importance of having "facts . . . narrowly confined" under state law sequestration procedures. *Mitchell* v. *W. T. Grant Co.*, ____ U.S. ____ (May 13, 1974), slip opinion, p. 17.

It was precisely because the Taylor moving affidavit, and the sequestration order it gave rise to, were anything but "narrowly confined" that the District Court granted defendants' motion to vacate the sequestration.

This is the state law ground of decision by the District Court, which was affirmed by the evenly divided Court of Appeals, and which this Court would be asked to pass upon if it were to take the case.

B. *THERE WERE NUMEROUS OTHER SUBSTANTIAL STATE LAW GROUNDS OF DECISION WHICH THE COURTS BELOW DID NOT REACH.*

Having vacated the sequestration on the threshold ground of insufficiency of the moving papers, the District Court noted:

> "The defendants have raised other substantial objections to the validity of the seizure but it is unnecessary to pass upon any of these." (84a)

The grounds not passed upon below include the following:

(1) *Negotiability.* Delaware has a unique rule permitting seizure in Delaware of stock issued by Delaware corporations even if the stock certificates are not found in Delaware. 8 Del. C. § 169; cf. 5A Del. C. § 8-317. Defendants contended that this special Delaware rule applies only to stock, while plaintiffs contended that it applies to all securities of Delaware corporations, even if negotiable (Petn., pp. 23-24, par. 4). On our view, none of the securi-

ties purportedly sequestered in this case may be reached under the Delaware statutes (except for 50 shares of stock which there is no reason to believe meet the $10,000 jurisditional requirement).*

There is a related conflict of laws issue in the case as to whether Delaware law or New York and California law on negotiability and seizure apply. It is clear that the seizure was improper if Delaware looks to the law of the place of issue of the securities here in question, and Delaware does apply the law of other states in such situations. 5A Del. C. §§ 1-105, 8-106. Cf. *Landau* v. *Best,* 187 A.2d 75 (Del. Sup. Ct. 1962); UCC § 8-317, as enacted in New York and California (54a).

As Judge Gibbons put it in the panel:

> "Thus, under the *Landau* analysis none of the requested securities except the 50 shares of . . . stock . . . has a situs in Delaware, and none was subject to the quasi in rem jurisdiction of a Delaware court. As to all of these negotiable investment securities, the order quashing the sequestration should be affirmed." (54a)

(2) *Prior Sale; Adequacy of the Complaint.* Property of only three of the nine defendants was purportedly seized. As to one of the three, Vileda, the evidence showed it had sold its securities several months before the purported seizure (76a, fn.; the Itel warrants had likewise already been transferred by Vileda, Doc. 45, Par. 3). As to the other two defendants whose property was purportedly seized, there was no bona fide complaint against them, as is required under Delaware law before their property may be

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* In addition, there is no bona fide claim against the stockholder, defendant Inter-Marketing. See IB (2), *infra.*

seized. *Hughes* v. *TWA,* 185 A.2d 886, 889 (Del. Sup. Ct. 1962). The allegations of the amended complaint (par. 18(a)) merely included these two defendants in a group of five named companies, "one or more" of which was alleged to have been involved in the disputed transaction. Plaintiffs sought to repair this defect by asserting a further state law contention, arguing that the corporate veil could be pierced, so as to permit the property of each of these defendants to be treated as property of all, by virtue of common ownership and control. Delaware law is flatly to the contrary. *Buechner* v. *Farbenfabriken Bayer A.G.,* 151 A.2d 125 (Del. Sup. Ct. 1959); *Sears, Roebuck & Co.* v. *Jardel,* 421 F.2d 1048, 1053 (3rd Cir. 1970); *Zubik* v. *Zubik,* 384 F.2d 267, 270 (3rd Cir. 1967).

(3) *Law vs. Equity.* There was a further state law issue as to whether the Delaware sequestration statute was applicable at all, since defendants argued that the action was one at law, in which case attachment rather then sequestration would have been the proper device to invoke (with important differences as to the requisite showing plaintiffs would have had to make—see *Hughes* v. *TWA, supra,* at 889). The distinction between law and equity retains great vitality in Delaware, with its separate Court of Chancery. The transparent artifices by which these plaintiffs have sought to convert an ordinary claim for money into an equitable action have long since been rejected. *Cochran* v. *F. H. Smith Co.,* 174 A. 119, 121 (Del. Ct. 1943); *Gaskewicz* v. *Spear,* 125 A.2d 269, 270 (Del. Ct. 1956); see *Tharp* v. *St. George's Trust Co.,* 34 A. 2d 253, 255 (Del. Ct. 1943) (no special relationship of trust and confidence between the parties is even alleged in the present case); see also *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469, 477-78 (1962).

All of these state law questions would have to be decided here—and decided against respondents—before the constitutional questions we urged below, and which were not reached below, would be ripe for consideration here.

II. THERE WOULD BE NEITHER NEED NOR OCCASION TO PASS UPON THE CONSTITUTIONAL QUESTIONS; NOR CAN IT BE ASSUMED THAT THE CIRCUIT COURT REACHED THE CONSTITUTIONAL QUESTIONS.

Neither party before the Court claims that the decision below deprived it of any constitutional rights. Defendants invoked the Constitution as a last line of defense, but our position was sustained below on state law grounds. Petitioners claim no violation of any constitutional right of theirs. Thus to deny certiorari will not leave even a possibility of constitutional wrong as between these parties.

There having been no constitutional question decided below, there will be no lower court precedent which might result in a wrongful denial of constitutional rights in any future case.

It is surely not the practice of this Court to generate constitutional issues which need not be decided. Quite the contrary, the rule is well established that if a statute can be construed in such a way as to avoid raising a constitutional question, then that is how the statute should be construed. As phrased by Chief Justice Hughes:

> ". . . if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the qustion may be avoided." *Crowell* v. *Benson,* 285 U.S. 22, 62 (1932). See also: *United States* v. *Rumely,* 345 U.S. 41, 45-56 (1953); *Lynch* v.

Overholser, 369 U.S. 705, 711 (1962); *Schneider* v. *Smith,* 390 U.S. 17, 26 (1968); *Washington Ethical Society* v. *District of Columbia,* 249 F.2d 127 (D.C. Cir. 1957).

This Court would thus have every reason to seek a construction of the Delaware laws, or an application of them to the present facts, which would make it unnecessary to reach the constitutional issues discussed in the Petition.

Yet the decision below reached just such a result—it construed and applied the Delaware statutes, rules, and decisions in a fashion which vindicates the rights defendants asserted, and does so without recourse to the Constitution.

We point out in this connection that Judge Gibbons characterized the decision in question as an "interpretation by an experienced Delaware district court judge of a Delaware statute and rule, with both of which he is obviously far more familiar [than the three-judge Court of Appeals panel] . . ." (55a).

Since the application of Delaware law can be sustained, the constitutional questions need not and should not be dealt with.

As Judge Gibbons, who voted to affirm in the panel, said:

> "Since the district court's interpretation of the Delawar Sequestration Statute provides an adequate nonconstitutional basis for decision, I would affirm on that ground . . ." (43a).

The Petition repeatedly asserts without foundation that the Court of Appeals divided evenly on the constitutional grounds. There is no basis for that assumption. The disagreement may have been solely as to the state law grounds, so that the constitutional questions were not reached. The

simplest assumption is that there was a 4-to-4 deadlock as to the adequacy of plaintiffs' moving papers, so that none of the judges had occasion to consider any further issues. Indeed, since the Petition sets forth three distinct constitutional issues, it is likely that *at most* only one or two judges of the full bench reached any given constitutional issue.

Such speculation is fruitless, and it is entirely unwarranted in view of the wise and well settled rule that an affirmance by necessity decides nothing. *Neil* v. *Biggers* 409 U.S. 188, 191-92 (1972); *U.S.* v. *Pink*, 315 U.S. 203, 286 (1942).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied and the unlawful seizure of defendants' property should at last be ended.

Respectfully submitted,

SAUL L. SHERMAN
750 Third Avenue
New York, New York 10017
ARTHUR G. CONNOLLY
ARTHUR G. CONNOLLY, JR.
Farmers Bank Building
Wilmington, Delaware 19899
Attorneys for Respondents.

BUSBY RIVKIN SHERMAN
LEVY AND REHM,
CONNOLLY, BOVE & LODGE,
Of Counsel

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